VERSUS

ALABAMA BY-PRODUCTS COMPANY, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF KOPPERS COMPANY, INC., RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI

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In the Supreme Court of the United States

No. 71-1672

T. W. GUTHRIE, ET AL,
PETITIONERS,

VERSUS

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OPINIONS BELOW

The opinion of the District Court is reported in 328 F.Supp. 1140. The opinion of the United States Court of Appeals for the Fifth Circuit is not as yet published but is Appendix III to petitioners' Petition for Certiorari on pages A-5-A-6.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does a Federal District Court have jurisdiction of an action brought for damages and injunctive re-

lief by riparian landowners along a navigable waterway, who use the land for commercial and recreational purposes, caused by the discharge of industrial waste in a tributary of such waterway which renders the waterway harmful and offensive to fish, wildlife, livestock and human beings and thereby impairs the use, value and enjoyment of their land, against industrial plants discharging such waste without a permit from the United States Corps of Engineers?

2. Does the Rivers and Harbors Act of 1899 (28 U.S.C., Sec. 407) imply a private right of action for riparian landowners for damage caused by the discharge of industrial waste in a tributary of a navigable stream flowing past their lands, which are unrelated to navigation or anchorage?

STATEMENT

Some sixty-five persons originally filed this suit in the District Court for the Northern District of Alabama against nineteen defendants. The complaint was later amended and increased the number of plaintiffs and defendants. Each of the defendants operate manufacturing plants on tributaries of the Warrior River, a navigable stream in Alabama.

Plaintiffs, riparian landowners, claim that by discharging industrial waste in said tributaries, defendants are polluting the navigable stream to such an extent that plaintiffs' recreational and commercial use of their land has become less valuable, in that waters of the river have become harmful and offensive to fish, wildlife, livestock and humans. They claim that the discharges are made in violation of the Rivers and Harbors Act of 1899, in that the defendants do not

possess a permit to discharge from the United States Corps of Engineers.

Plaintiffs attempted to establish jurisdiction in several ways, such as: diversity of citizenship, violation of the Civil Rights Act, violation of the Fifth and Fourteenth Amendments to the United States Constitution, and that the action arose under the Constitution, laws and treaties of the United States (28 U.S.C., Sec. 1331).

In their brief the petitioners have abandoned all arguments except that this Court has jurisdiction under the provisions of 28 U.S.C., Sec. 1331, in that the respondents have violated the Rivers and Harbors Act of 1899, Title 28, U.S.C., Sec. 407.

The District Court held that the facts alleged failed to show that there was an obstruction to navigation involved and that Title 28, U.S.C., Sec. 407, does not imply a private right of action for riparian landowners for the pollution of a navigable stream flowing past their properties, but that their remedy was through state common law actions. *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140.

The United States Court of Appeals for the Fifth Circuit affirmed on the basis of the District court's opinion.

The petitioners have petitioned this Court for certiorari.

STATUTES INVOLVED

1. Petitioners have set out verbatim in their brief at page 3 thereof, Section 407 of Title 33, U.S.C.,

the Rivers and Harbors Act of 1899, one of the statutes involved.

2. Title 28, U.S.C., Sec. 1331,(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

ARGUMENT

The petitioners seek review by this Court on the following several grounds: That there is an important question of federal law involved, that the Fifth Circuit's holding is contrary to numerous holdings of this Court and the Fifth Circuit's holding is in conflict with similar holdings of other Federal Courts of Appeal.

It is within the sound discretion of this Court to determine whether or not the question of federal law is of such importance as to require a review of this case. Respondent doubts that this case is of such importance, since two lower courts have resolved the questions involved in such a well-reasoned manner that there leaves no doubt as to the answer to questions raised.

There appears to be no conflict with *U. S. v. Standard Oil Co.*, 384 U.S. 224, 86 S.Ct. 1427, 16 L.ed.2d 492 (1966). This case held that the discharge of 100 octane gasoline in a navigable stream violated the Rivers and Harbors Act of 1899, 33 U.S.C., Sec. 407, in that such discharge was refuse. Such a discharge

was definitely a hazard to navigation and the proceeding was brought by the United States for violation of this penal statute, as is authorized by Title 33, Sec. 413, U.S.C.

Gully v. First National Bank, 299 U.S. 109, 81 L.ed. 70, 57 S.Ct. 96 (1936), presents no conflict with the lower court's opinion, but substantiates the conclusion that the facts alleged do not require the interpretation of the federal statute (Rivers and Harbors Act of 1899) and that complete relief can be given under the State statutes. That federal jurisdiction merely lurks in the background.

Tunstall v. Brotherhood of Locomotive Firemen and Engineers, 323 U.S. 210 (1944); and *Steele v. L & N Railroad Company,* 323 U.S. 192 (1944), being similar cases, held that the Railway Labor Act imposes upon a labor union acting under it, the duty to act fairly toward members of the labor union without respect to race and, when it did not, it violated the constitutional rights of the plaintiff, a member of the union. We see no analogy to the case here.

Texas Pacific Railway Co. v. Rigsby, 241 U.S. 33, 36 S.Ct. 482, 60 L.ed. 874 (1915), substantiates further the reasoning of the lower court in the instant case. There the injured party, suing under the Federal Safety Appliance Act, was one for whom the Act was enacted to protect, an employee of the railroad, and, therefore, there arose an implied action for recovery for his injuries. The Rivers and Harbors Act of 1899 was not passed to protect riparian owners from polluted water, but for the benefit of the United States to protect navigation.

Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.ed. 939 (1946), is inapplicable to substantiate petitioners' contentions being a case where the court implied a remedy for recovery of damages where constitutional rights had been violated, and not to enforce a federal penal statute enacted for the protection of others than this applicant.

Sierra Club v. Morton, 31 L.ed.2d 636 (1972), had to do with standing to sue, which is no issue here. There such standing was denied because the plaintiff could show no palpable economic injury.

Wyandotte Transportation Co. v. U. S., 389 U.S. 191, 88 S.Ct. 379, 19 L.ed.2d 407 (1967), lends no assistance to the petitioners. In this case a sunken vessel was a most dangerous obstruction to navigation. It seems to confirm the holding in the instant case.

In *J. I. Case v. Borak*, 377 U.S. 426 (1964), the statute involved provided for suits in equity and at law to enforce liability for violation of that act. There was no question of an implied remedy.

United States v. Ballard Oil Co., 196 F.2d 369 (1952); *La Merced*, 84 F.2d 444 (1936), and *U. S. v. Esso Standard Oil*, 375 F.2d 621 (1967), are cases where the government prosecuted because of oil spillage in navigable streams. Oil so spilled was held to be refuse and that such acts violated the Rivers and Harbors Act of 1899. It is seen by these cases that the government, for whose benefit the Act was passed, was the one to enforce the Act. It can hardly be doubted that oil floating on the surface of a navigable stream is a hazard to navigation and that it is refuse in the sense sought to be protected against by the Act.

The petitioners here are seeking to recover alleged damages to their real property occasioned by the pollution of the Warrior River which flows by their holdings. They claim injury to their recreational facilities built along said River. They also seek an injunction to prevent further discharge of industrial waste by respondents into a tributary of the River.

As is stated in the opinion of the District Court, 328F.Supp. 1140, at 1144, the relief prayed for by the petitioners does not depend exclusively upon a violation of Title 33, Sec. 407, U.S.C., since the state law of Alabama is geared to provide complete relief in damages and by injunction for the damage done to riparian landowners. *Williams v. Still*, 263 Ala. 214, 82 So.2d 230 (1955); *Elmore v. Ingalls*, 245 Ala. 481, 17 So.2d 674 (1944); *Sloss-Sheffield Steel & Iron Co. v. Morgan*, 181 Ala. 587, 61 So. 283 (1913); and *Montgomery Limestone Co. v. Bearden*, 256 Ala. 269, 54 So.2d 571 (1951).

In *Johnston v. Byrd*, 354 F.2d 982 (5th Cir. 1965), the Court stated:

> "State law determines that question, not federal law. A question of federal law is often 'lurking in the background' of every case. In order to invoke the jurisdiction of a federal court there must be 'a substantial claim founded "directly" upon federal law'."

Therefore, unless there is a real issue involving the construction of a federal statute or some federal law or the Constitution of the United States, no federal question jurisdiction is present. As the Court has stated in *Gully v. First National Bank*, supra:

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action (cases cited). The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another (cases cited). A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (cases cited), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."

and as further stated in this case:

> " 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.' "

And in *Marshall v. Desert Properties Co.*, 103 F.2d 551 (1939), where the Court quoted as follows:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is validity of an authority every time an act done by such authority is disputed."

See also *Gray v. Oklahoma Land and Cattle Company*, 240 F.Supp. 646 (1965), and *Chambers-Liberty*

Counties Navigation District v. Parker Brothers & Co., Inc., 263 F.Supp. 602 (1967).

Even though petitioners rely on a violation of the federal statute, 33 U.S.C., Sec. 407, this statute is silent as to granting relief to individuals. It is a penal statute to be enforced by the government and enacted to protect the navigable waterways of this nation. Petitioners say that a private right of action is implied, there being a violation of a penal statute.

The violation of a penal statute does not imply a remedy for all persons, but only for those for whom the statute was intended to protect. The law correctly stated is: Where a statute establishes a standard of conduct, a person injured by the breach of that standard, may recover damages for that breach even though the statute fails to provide a private right of action, *if he is within the class for whom protection was intended.* Or, as stated in Restatement of Law, Second, Torts, Section 286, page 27:

> "A statute, ordinance, or administrative regulation may, because of its title, preamble, detailed provisions, history or other reasons, be found to be intended for the protection of the interests of only a particular class of persons. If so, a violation of the provision will be held to be negligence toward persons who are included within the particular class, but not toward those who do not fall within it."

The case of *Fitzgerald v. Pan American Airways*, 229 F.2d 499 (1956) also substantiates this statement. Although cited by petitioners to substantiate that a private civil action is implied for everyone for the

violation of a criminal statute, the opening statement of the Court in commenting on a violation of Section 484(b) of the Civil Aeronautics Act, 49 U.S.C., Secs. 401, et seq., the statute involved in that case, indicates definitely that the statute was enacted for the benefit of the class of persons to which the plaintiffs belonged:

> "The latter section is for the benefit of persons, including passengers using the facilities of air carriers. Consequently, by implication, its violation creates an actionable civil right for the vindication of which a civil action may be maintained by any such person who has been harmed by the violation. As we said in Reitmaster v Reitmaster, 2 Cir., 162 F.2d 691, 694: 'Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.' "

The legislative history of the Rivers and Harbors Act of 1899 is convincing of the fact that such an action as was brought by these petitioners, was not contemplated thereby, but that the Act was promulgated to protect navigation on the waterways of the United States, the principal beneficiary being the United States Government. In *Wyandotte Transportation Co. v. U. S.*, supra, the Court said:

> "Article 1, § 8 of the Constitution grants to Congress the power to regulate commerce. For the exercise of this power the navigable waters

> of the United States are to be deemed the 'public property of the nation and subject to all the requisite legislation by Congress.' . . . the federal government is charged with insuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain free of obstruction . . . the Rivers and Harbors Act of 1899, an assertion of the soverign power of the United States . . . was obviously intended to prevent obstructions in the nation's waterways. Despite some difficulties with the wording of the Act, we have consistently found its coverage to be broad . . . and we have found that a principal beneficiary of the Act, if not the principle beneficiary, is the government itself."

A review of the history of the Act is set out in the District Court's opinion, Appendix III of petitioners' Petition for Writ of Certiorari, Pages A-16 through A-19, and 328 F.Supp. 1140 (1971) at pages 1146-1148. Respondent does not believe it can improve on the statements made and the conclusions drawn by the Court, and adopts such statements.

Respondent calls to this Court's attention, that no court during the history of this Act has determined that there exists under it a private right of action, except where such was bound up with rights growing out of obstruction to navigation or anchorage. Some of such cases are: *Neches Canal Co. v. Miller & Vider Lumber Co.*, 24 F.2d 763 (1928); *Acme Boat Rentals v. J. Ray McDermott Co.*, 424 F.2d 393 (1970); *Maier v. Publicker Commercial Alcohol Co.*, 62 F.Supp. 161 (1945); *Lauritzen v. Chesapeake Bay Bridge & Tunnel District*, 259 F.Supp. 633 (1966).

In the cases where damages were claimed and there was no obstruction to navigation or anchorage involved, the courts have consistently denied recovery. *H. Christiansen & Sons, Inc. v. City of Duluth*, 154 F.2d 205 (1946); *Chambers-Liberty Counties Navigation District v. Parker Brothers & Co.*, 263 F.Supp. 602 (1967).

In the latter case, the Court observed:

> "Both section 403 and section 407 are concerned with obstructions to navigation. As I read the petition, an essential element of the Navigation District's complaint does not involve an injury to or obstruction of navigation; nor is its claim of damages predicated upon such an occurrence. Such an allegation is an essential element of a cause of action arising under 33 U.S.C. § 403 or § 407. See United States v. Bigan, 170 F. Supp. 219 (W.D. Penn. 1959); City of Memphis v. Ingram, 98 F.Supp. 395 (E.D. Ark. 1951), rev'd on other grounds, 195 F.2d 338 (8th Cir. 1952); Gulf Atlantic Transportation Co. v. Becker County Sand & Gravel Co., 122 F.Supp. 13, 17 (E.D.N.C. 1954), and cases cited therein. Nor does the petition allege or imply that the relief sought or the right pursued involves a dispute or controversy respecting the validity, construction, or effect of either of these statutes; a requirement for federal-question removal."

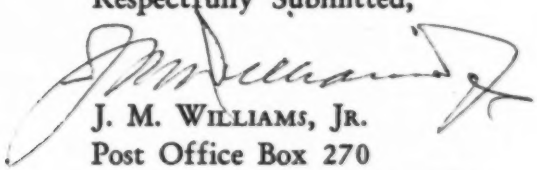
The District Court's conclusions, adopted by the Fifth Circuit, should be sustained, there being no obstruction or hindrance to navigation or anchorage involved, the statute not having been enacted to protect riparian landowners from polluted waters flowing by

their land, and for the further reason that there can be no remedy implied from this criminal statute, for the protection of the class of persons to which the petitioners belong.

CONCLUSION

The petition for certiorari should be denied.

Respectfully Submitted,



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